

**SRI Eleven 1407 Broadway Operator LLC v Infinity
Equity Ventures LLC**

2022 NY Slip Op 30236(U)

January 24, 2022

Supreme Court, New York County

Docket Number: Index No. 654166/2020

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE BLUTH PART 14

Justice

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SRI ELEVEN 1407 BROADWAY OPERATOR LLC

Plaintiff,

- v -

INFINITY EQUITY VENTURES LLC,

Defendant.

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INDEX NO. 654166/2020
MOTION DATE 01/21/2022
MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141

were read on this motion to/for VACATE - DECISION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 128, 129, 130, 131, 142, 144, 145, 146, 147, 167

were read on this motion to/for EXTEND - TIME

Motion Sequence Numbers 003 and 004 are consolidated for disposition.

The motion (MS003) by defendant to vacate the portion of this Court's decision in MS002 striking defendant's verified answer without opposition is granted in part. The motion (MS004) by defendant for an extension of time to serve the order to show cause brought under MS003 is granted to the extent that the order to show cause (MS003) is deemed timely served nunc pro tunc.

Background

In this landlord-tenant dispute, the Court previously struck defendant's answer as defendant did not offer opposition to plaintiff's cross-motion seeking that relief (NYSCEF Doc.

No. 109). The Court observed that defendant waited until nearly the end of the day on the return date before seeking an adjournment (*id.*). The Court stressed that the adjournment request did not state whether counsel for defendant had reached out to counsel for plaintiff, the length of the adjournment sought or even why defendant needed an extension (*id.*).

Here, counsel for defendant explains that he started drafting his response to the underlying cross-motion and worked on it “for many days and it was ready for filing on the November 29 return date of the motions. Somehow, after I finished my reply, I managed to delete or not save my work” (NYSCEF Doc. No. 108). Counsel for defendant attaches communications with an IT technician to support his claim that he inadvertently deleted his reply and that he was working on the issue throughout the return date.

In opposition, plaintiff claims that defendant failed to establish a reasonable excuse for not opposing the cross-motion or a meritorious defense. It points out that defendant’s affirmative defenses are barred by the lease and that the affidavit from Isaac Franco (who was a principal in defendant) is not sufficient to raise a meritorious defense.

Discussion

As an initial matter, the Court observes that defendant established a reasonable excuse for not opposing the cross-motion by plaintiff to strike the answer. While counsel for defendant’s computer troubles unfortunately caused the current motion practice, the fact is that this Court declines to strike a defendant’s answer where the attorney submits emails showing there was, in fact, an issue with his motion papers (NYSCEF Doc. No. 110). It is simply too harsh a remedy to reject this excuse. And defendant established a possibly meritorious defense by submitting affidavits on behalf of defendant. Moreover, this Court prefers to decide cases on the merits and

will consider defendant's opposition to the plaintiff's cross-motion to strike. Counsel for defendant eventually uploaded opposition, albeit late, and so this Court will consider those papers (NYSCEF Doc. Nos. 90-101).

The Court observes, however, that it adheres to its decision *not* to impose spoliation sanctions on plaintiff as decided in MS002 (in that motion sequence number, defendant moved for initially spoliation sanctions). The following analysis will only consider the cross-motion by plaintiff to strike defendant's answer or, in the alternative, to comply with outstanding discovery obligations.

In support of the cross-motion, plaintiff argues that defendant failed to preserve documents relevant to this litigation and should be sanctioned for failing to conduct a reasonable search of its records. Plaintiff argues that defendant's document production is deficient because defendant has not produced a privilege log and failed to produce documents responsive to several of plaintiff's requests.

In opposition, defendant argues that the cross-motion is untimely. It also attaches an affidavit from Mr. Kassin (manager of defendant) who claims that defendant produced all the records that defendant possesses (NYSCEF Doc. No. 98).

Based on this affidavit, the Court finds as follows: defendant has until February 3, 2022 to produce any relevant documents it possesses and a privilege log (if applicable). Any documents not produced by this date cannot be used in this case (either at trial or in any subsequent motion). If it turns out that defendant has withheld documents or failed to submit a privilege log if required, plaintiff may, of course, seek appropriate penalties. This Court cannot force defendant to produce documents it represents it does not have and where it attached an affidavit describing the steps it took to locate documents.

Moreover, the Court observes that although plaintiff focuses extensively on the merits of defendant's affirmative defenses, plaintiff has not moved for dispositive relief in this relatively straightforward breach of lease case. Plaintiff's cross-motion that defendant failed to timely oppose only sought to strike or, in the alternative to compel, defendant to respond to discovery obligations. It did not seek summary judgment on the merits.

Based on the foregoing, the Court strikes the note of issue and places this case back on the conference calendar. The inquest scheduled for January 25, 2022 is canceled. In its discretion, the Court directs defendant to pay to plaintiff the cost of filing the note of issue. The current motion practice would not have been necessary had counsel for defendant done what it was supposed to do. The parties are directed to appear for a remote conference on April 6, 2022.

With respect to MS004, the Court grants that relief *nunc pro tunc*. In this order to show cause, counsel for defendant admits that he did not serve the order to show cause timely and seeks an extension. The Court observes that this is an e-filed case and so plaintiff had adequate knowledge of the first order to show cause (MS003). In fact, plaintiff had enough time to draft an affirmation in support and a *thirty-page* memorandum of law. In other words, because MS003 was fully briefed, there is no reason not to consider on the merits and overlook defendant's failure to timely upload a signed copy of the order to show cause (which was already uploaded to the docket by the Court).

The Court also notes that, if the lease provides for reasonable attorneys' fees, all this motion practice and arguing about procedures and discovery may come with a price. Usually, a swift resolution on the merits is best for all parties.

Accordingly, it is hereby

ORDERED that the motion (MS003) by defendant to vacate is granted only to the extent that the branch of this Court's decision in MS002 that granted plaintiff's cross-motion to strike defendant's answer as without opposition is vacated and, upon consideration of defendant's papers, the Court grants plaintiff's cross-motion only to the extent that defendant has until February 3, 2022 to produce any remaining relevant documents and a privilege log (if one is applicable) and any documents not produced by this date cannot be used in this case (the answer is not stricken); and it is further

ORDERED that within 7 days of this decision, defendant shall reimburse plaintiff for the cost of the note of issue filed by plaintiff (but no one waives attorneys' fees which may be decided later); and it is further

ORDERED the note of issue is vacated and the case is stricken from the trial calendar and the inquest is canceled; and it is further


ORDERED that, within 15 days from the entry of this order, defendant shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further

ORDERED that such upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the parties shall appear for a remote conference on April 6, 2022.

1/24/2022

DATE



ARLENE BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE